United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

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74-1222

To be argued by
THOMAS P. SMITH

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1222

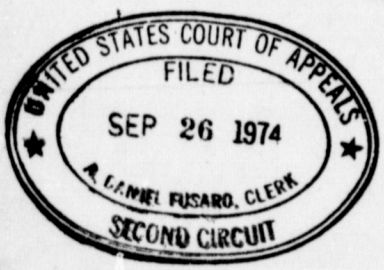
FRANK GRASSO,
Appellee-Petitioner,

—v.—

JOHN J. NORTON, Warden, Federal Correctional Institution, Danbury, Connecticut, et al.,
Appellants-Respondents.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF AND APPENDIX FOR THE APPELLANTS-RESPONDENTS



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Statement of the Case

By this appeal the Appellants-Respondents seek to overturn an April 30, 1974 decision of the United States District Court for the District of Connecticut. That decision, *Grasso* v. *Norton*, 376 F. Supp. 116 (D. Conn. 1974) (hereafter *Grasso II*), ordered the release of Frank Grasso from the custody of the United States and held that 18 U.S.C. § 4208(a)(2) requires that a full scale institutional hearing be given at the one-third point of a § 4208(a)(2) sentence when, as in the case of Frank Grasso, parole has been denied on the basis of a hearing held within three months of confinement, and incarceration has been ordered continued to the expiration of the sentence imposed.

Appellee Grasso, formerly an inmate at the Federal Correctional Institution at Danbury, Connecticut, where he was serving a three year sentence imposed pursuant to 18 U.S.C. § 4208(a)(2), petitioned the District Court for a writ of habeas corpus, alleging that the United States Board of Parole had wrongfully continued his confinement to the expiration of sentence on the basis of a parole hearing conducted approximately ninety days after his imprisonment. In a February 5, 1974 Memorandum of Decision, *Grasso* v. *Norton*, 371 F. Supp. 171 (D. Conn. 1974) (hereafter *Grasso I*), the Honorable Jon O. Newman granted relief, ordering that respondents give the petitioner additional parole consideration "at or prior to the expiration of one-third of his sentence. . . ." *Id.* at 175.

In response to the Court's order in *Grasso I*, a panel of Parole Board hearing examiners thoroughly reviewed petitioner's institutional record and a specially-prepared report for the purpose of determining whether parole was warranted at approximately the one-third point of petitioner's sentence. Despite that review, Grasso was again denied parole and continued to the expiration of his sentence.

In a second Memorandum of Decision on Motions for Supplementary Relief, which had been filed by Grasso and the petitioner in an unrelated case, the District Court again ruled in petitioner's favor. That ruling, *Grasso* v. *Norton*, 376 F. Supp. 116 (D. Conn. April 30, 1974) hereafter *Grasso II*), which forms the basis for the instant appeal, ordered the petitioner permanently discharged from federal custody and held that in circumstances similar to those in *Grasso I* a full scale hearing at the one-third point of an (a)(2)—inmate's sentence is required by 18 U.S.C. § 4208 (a)(2).

Statutes Involved

TITLE 18, UNITED STATES CODE

§ 4201.

There is hereby created in the Department of Justice a Board of Parole to consist of eight members to be appointed by the President, by and with the advice and consent of the Senate. The members of the Board first appointed under this section shall be appointed for terms as follows: Two for two years, two for three years, two for four years, and two for six years, respectively, from the effective date of this section. The term of office of a successor to any member shall expire six years from the date of the expiration of the term for which his predecessor was appointed, except that any person appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed for the remainder of such term. Upon the expiration of his term of office, a member of the Board shall continue to act until his successor shall have been appointed and qualified. The Attorney General shall from time to time designate one of its members to serve as Chairman of said Board and delegate to him the necessary administrative duties and responsibilities.

§ 4202.

A federal prisoner, other than a juvenile delinquent or a committed youth offender, wherever confined and serving a definite term or terms of over one hundred and eighty days, whose record shows that he has observed the rules of the institution in which he is confined, may be released on parole after serving one-third of such term or terms or after serving fifteen years of a life sentence or of a sentence of over forty-five years.

§ 4203.

(a) If it appears to the Board of Parole from a report by the proper institutional officers or upon application by a

prisoner eligible for release on parole, that there is a reasonable probability that such prisoner will live and remain at liberty without violating the laws, and if in the opinion of the Board such release is not incompatible with the welfare of society, the Board may in its discretion authorize the release of such prisoner on parole.

Such parolee shall be allowed in the discretion of the Board, to return to his home, or to go elsewhere, upon such terms and conditions, including personal reports from such paroled person, as the Board shall prescribe, and to remain, while on parole, in the legal custody and under the control of the Attorney General, until the expiration of the maximum term or terms for which he was sentenced.

Each order of parole shall fix the limits of the parolee's residence which may be changed in the discretion of the Board.

(b) The parole of any prisoner sentenced before June 29, 1932, shall be for the remainder of the term or terms specified in his sentence, less good time allowances provided by law.

§ 4208.

(a) Upon entering a judgment of conviction, the court having jurisdiction to impose sentence, when in its opinion the ends of justice and best interests of the public require that the defendant be sentenced to imprisonment for a term exceeding one year, may (1) designate in the sentence of imprisonment imposed a minimum term at the expiration of which the prisoner shall become eligible for parole, which term may be less than, but shall not be more than one-third of the maximum sentence imposed by the court, or (2) the court may fix the maximum sentence of imprisonment to be served in which event the court may specify that the prisoner may become eligible for parole at such time as the board of parole may determine.

(b) If the court desires more detailed information as a basis for determining the sentence to be imposed, the court may commit the defendant to the custody of the Attorney General, which commitment shall be deemed to be for the maximum sentence of imprisonment prescribed by law, for a study as described in subsection (c) hereof. The results of such study, together with any recommendations which the Director of the Bureau of Prisons believes would be helpful in determining the disposition of the case, shall be furnished to the court within three months unless the court grants time, not to exceed an additional three months, for further study. After receiving such reports and recommendations, the court may in its discretion: (1) Place the prisoner on probation as authorized by section 3651 of this title, or (2) affirm the sentence of imprisonment originally imposed, or reduce the sentence of imprisonment, and commit the offender under any applicable provision of law. The term of the sentence shall run from date of original commitment under this section.

(c) Upon commitment of a prisoner sentenced to imprisonment under the provisions of subsection (a), the Director, under such regulations as the Attorney General may prescribe, shall cause a complete study to be made of the prisoner and shall furnish to the board of parole a summary report together with any recommendations which in his opinion would be helpful in determining the suitability of the prisoner for parole. This report may include but shall not be limited to data regarding the prisoner's previous delinquency or criminal experience, pertinent circumstances of his social background, his capabilities, his mental and physical health, and such other factors as may be considered pertinent. The board of parole may make such other investigation as it may deem necessary.

It shall be the duty of the various probation officers and government bureaus and agencies to furnish the board of parole information concerning the prisoner, and, whenever

not incompatible with the public interest, their views and recommendations with respect to the parole disposition of his case.

(d) The board of parole having jurisdiction of the parolee may promulgate rules and regulations for the supervision, discharge from supervision, or recommitment of paroled prisoners.

Questions Presented

1. Did the District Court err in holding that 18 U.S.C. § 4208(a)(2) prohibits the United States Board of Parole from continuing the confinement of an (a)(2) prisoner beyond the one-third point of his sentence on the basis of a parole hearing held within three months of his incarceration?

2. Did the District Court err in holding that 18 U.S.C. § 4208(a)(2) requires that a full-scale institutional parole hearing be given at the one-third point of the sentence of an (a)(2) prisoner who has been denied parole on the basis of an earlier institutional hearing held within three months of incarceration?

Statement of Facts

On February 13, 1973, the United States District Court for the Northern District of New York sentenced Frank Grasso to three years imprisonment pursuant to 18 U.S.C. § 4208(a)(2) for distribution of methamphetamine in violation of 21 U.S.C. § 841(a)(1). On May 7, 1973, Grasso appeared before United States Parole Board hearing examiners at the Federal Correctional Institution at Danbury. Shortly thereafter, he received notice that parole had been denied and that his incarceration would be "continued to expiration" of his sentence.

Approximately two months later, Grasso petitioned for a writ of habeas corpus in the District of Connecticut. The Court granted permission to proceed *in forma pauperis* and appointed counsel, who on December 19, 1973 filed an amended petition for habeas relief. In substance, that petition alleged that the United States Board of Parole had wrongfully deprived petitioner of the right to further parole consideration by ordering that his confinement be continued to the expiration of his sentence. In addition to a writ of habeas corpus, the petition further sought mandamus and a declaratory judgment that individuals sentenced pursuant to 18 U.S.C. § 4208(a)(2) are entitled to "periodic institutional review hearings during their term of confinement."

In a Memorandum of Decision dated February 5, 1974, *Grasso* v. *Norton*, 371 F. Supp. 171 (D. Conn. 1974) (*Grasso I*), the Honorable Jon O. Newman agreed with the thrust of the amended petition and held, in effect, that by continuing a § 4208(a)(2) inmate to the expiration of his sentence on the basis of an adverse parole decision made within three months of his incarceration, the respondent Parole Board was affording § 4208(a)(2) inmates less effective parole consideration than is given non-(a)(2) prisoners, who by virtue of 18 U.S.C. § 4202 are eligible for parole only after serving one-third of their sentences. Reasoning that the Board of Parole could not legally continue Grasso's incarceration beyond the juncture at which he *would have been* eligible for parole consideration had he *not* been sentenced pursuant to 18 U.S.C. § 4208(a)(2), the District Court ordered that petitioner be released unless within thirty days the Board (1) rescinded its decision to continue petitioner to the expiration of his sentence, and (2) substituted in its place a new order providing for further "parole consideration" at, or prior to, the one-third point of his sentence. 371 F. Supp. at 175.

In actuality respondents had far less than thirty days within which to comply with the Court's February 5 order.

By its very terms, that order required that additional "parole consideration" be given to the petitioner before the expiration of one-third of his sentence. Judgment in that case entered against the respondents on February 7, 1974. Putting aside any jail time credit to which petitioner was entitled, the fact that he began serving his three year sentence on February 13, 1973, indicates that the one-third point of that sentence was reached on February 13, 1974, approximately six days after judgment entered in *Grasso I*. Were one to compute the twenty days jail time credit to which petitioner had become entitled, it is apparent that the one-third point of Grasso's sentence had already been reached on January 23, 1974, approximately fifteen days *before* judgment in *Grasso I* was even entered. As a result respondents were under significant pressure.

Motions for a stay of Judge Newman's order pending appeal having been denied by both the District Court and the United States Court of Appeals for the Second Circuit, respondents initially reacted to the February 5 order by requesting a ten day stay so that hearing examiners could be dispatched to Danbury. On February 19, 1974, a further extension of this stay until March 1 was obtained from the Court of Appeals. Later, upon closer analysis of the District Court's opinion in *Grasso I*, however, it became apparent to the Board that the institutional hearing which it had initially contemplated was merely one way to comply with the Court's order, and that adequate "parole consideration" could also be given by a carefully conducted review of an inmate's institutional record and specially-prepared progress report. As a result, the United States Board of Parole met on February 27, 1974 and adopted a procedure for a complete review of Grasso's record. At no time did the respondent Board of Parole believe that the District Court's February 5 order could only be complied with by affording the petitioner an institutional hearing, and at all times the Board felt that compliance with the Court's order could be had by thoroughly considering the petitioner's file

and progress report. As a result, no additional institutional hearing was provided to the petitioner Grasso. Instead, a review of Grasso's file was conducted in accordance with a procedure adopted by the Board of Parole on February 27, 1974.

Attempting to comply with Judge Newman's order in *Grasso I*, the respondent Parole Board initiated the preparation of a detailed, written report on petitioner Grasso's institutional progress between May 7, 1973, the date of his parole hearing, and March 1, 1974, the date on which further parole consideration was in fact given. This report, which was prepared by petitioner's caseworker with the assistance of the petitioner himself, was carefully reviewed together with the remainder of petitioner's file for the purpose of determining whether parole was warranted. Despite careful review of this data by the Board, a panel of hearing examiners *again* voted to continue Frank Grasso's incarceration to the expiration of his sentence.

Viewing the respondent Parole Board's progress report and file review procedure as violative of the order in *Grasso I*, petitioner moved for supplementary relief in the District Court. Prior to receiving either petitioner's or respondents' memoranda as to the appropriateness of supplementary relief, however, the District Court had ruled in an unrelated case, *Diaz* v. *Norton*, 376 F. Supp. 112 (D. Conn. March 19, 1974), that a full-scale hearing, rather than a file review, was required at the one-third point of a § 4208(a)(2) sentence. On April 5, 1974, the respondent moved for a reopening and reconsideration of the *Diaz* decision. At this juncture, *Grasso* and *Diaz* were consolidated, and on April 8, 1974, a supplementary hearing was held for the purpose of determining whether the progress report and file review procedure conducted with respect to Frank Grasso was sufficient, and whether the additional "parole consideration" requirement of *Grasso I* should be applied retroactively to inmates whose parole hearings had been conducted prior to that decision.

On April 30, 1974, the District Court handed down a joint Memorandum of Decision, *Grasso* v. *Norton*, 376 F. Supp. 116 (D. Conn. 1974) (*Grasso II*), holding, in effect that *Grasso I* is fully retroactive, and that § 4208(a)(2) inmates, who have been denied parole in *Grasso*-type situations, must be afforded a full scale institutional hearing at the one-third point of their sentences. Finding that the respondents had failed to comply with its February 5, 1974 order, the District Court further ordered that the petitioner Grasso be permanently discharged from federal custody. Judgment in favor of the petitioner was entered on May 5, 1974, and notice of appeal of the District Court's decision in *Grasso* v. *Norton, supra* (*Grasso II*), has been timely filed.

ARGUMENT

I.

The District Court erred in holding that 18 U.S.C. § 4208(a)(2) prohibited the respondents from continuing the confinement of an (a)(2) prisoner beyond the one-third point of his sentence on the basis of a parole hearing held within three months of his incarceration.

The District Court's ruling in *Grasso I* forms the conceptual underpinning for its later ruling in *Grasso II*. In *Grasso I* the Court concluded that (a)(2)-prisoners who have been denied parole on the basis of initial hearings held within three monts of incarceration must be given additional parole consideration at the one-third point of their sentences where the interval between that point and the earlier adverse decision is "substantial." 376 F. Supp. at 119. A reading of the Memorandum of Decision in *Grasso* v. *Norton*, 371 F. Supp. 171 (D. Conn. 1974) (*Grasso I*), indicates that this conclusion was based on four factors: (a) the Court's

interpretation of portions of the legislative history of 18 U.S.C. § 4208(a)(2); (b) the Court's view as to why sentencing judges use that section; (c) the Court's view as to whether three months is an adequate period of time within which the respondents may fairly evaluate an (a)(2) inmate for the purpose of determining whether institutional performance has been so commendable as to warrant earlier parole; and (d) the Court's view that it is anomalous to deny (a)(2) prisoners parole consideration at the same juncture at which such consideration is given non-(a)(2) inmates. Appellants respectfully submit that none of these four factors, either alone or together, supports the District Court's finding that 18 U.S.C. § 4208(a)(2) prohibits an (a)(2) inmate from being continued beyond the one-third point of his sentence on the basis of an adequate parole hearing held within the three months of confinement.

The language employed in 18 U.S.C. § 4208(a)(2) in no way supports the District Court's ruling in *Grasso I*. In pertinent part that section merely provides that

> "(a) Upon entering a judgment of conviction . . . , when in its opinion the ends of justice and best interests of the public require that the defendant be sentenced to imprisonment for a term exceeding one year . . . , (2) the court may fix the maximum sentence of imprisonment to be served in which event the court may specify that *the prisoner may become eligible for parole at such time as the board of parole may determine.*" (Emphasis added).

If anything, by expressly providing that an (a)(2) inmate may become eligible for parole at such time as the Board of Parole in its discretion may determine, that section manifests an intent to differentiate (a)(2) prisoners from those inmates whose parole eligibility is governed by 18 U.S.C. § 4202. By holding, in effect, that an (a)(2) inmate must be given additional parole consideration at the same junc-

ture that non-(a)(2) inmates are given initial consideration, *Grasso I* reconstructs a connection between § 4202 and § 4208(a)(2). Not only is such a connection uncalled for by the terminology of (a)(2), it is also at odds with the basic thrust of 18 U.S.C. § 4208(a)(2): that (a)(2) inmates are to be treated differently from their non-(a)(2) counterparts.

A fair reading of the legislative history of § 4208(a)(2) similarly gives no support to the District Court's interpretation of that section. Relying on portions of two sentences spoken by Emanuel Celler, the author of the 1958 amendment creating subsection (a)(2), and Deputy Attorney General Lawrence Walsh during a lengthy House of Representatives Subcommittee hearing, the District Court concluded that Congress intended prison performance to be a key factor in determining whether an inmate sentenced under subsection (a)(2) would be eligible for early parole. The Court then went on to reason that, since prison performance was such a "key factor", additional parole consideration must be given at a time when the inmate has had an opportunity to "demonstrate that his performance in prison over some substantial length of time justifies early parole." 371 F. Supp. at 174. Since a non-(a)(2) prisoner is given a full one-third of his sentence in which to demonstrate commendable institutional performance before being considered for parole, the Court reasoned, it is anomalous to deny that same benefit to an (a)(2) inmate.

Appellants respectfully submit that the District Court's interpretation of the history and purpose of 18 U.S.C. § 4208(a)(2) is erroneous. Contrary to the impression created by the fragments of legislative history on which the Court in *Grasso I* relied, subsection (a)(2) was not enacted for the purpose of rewarding good institutional progress with parole. Nor was that subsection enacted to serve as a more lenient sentencing device than 18 U.S.C. § 4202. Rather, the overriding purpose for the enactment

of § 4208(a)(2) was the minimization of sentence disparity. In his testimony on H.J. Res. 425, which ultimately became subsection (a)(2), Congressman Celler defined as follows the evil which § 4208(a)(2) was designed to eliminate:

> "The existence of marked disparities in the sentences imposed by Federal courts upon offenders who have been convicted of similar offenses and whose backgrounds and prior records are substantially similar has been the subject of concern for more than a generation . . . .
>
> In seeking to bring about a partial resolution of this serious problem, I introduced three bills embodying the suggestions of the Advisory Corrections Council, which are aimed at minimizing sentence disparity." Hearing on H.J. Res. 424, H.J. Res. 425, and H.R. 8923 before Subcommittee No. 3, House Committee on the Judiciary, 85th Cong., 2d Sess. (April 30, 1958) at 4.

The extent of the evil to which H.J. Res. 425 was directed is more fully explained in Senate Report No. 2013, 85th Cong., 2d Sess. (July 29, 1958), which accompanied H.J. Res. 424, also introduced by Congressman Celler. That report referred to Bureau of Prison statistics indicating that the average sentence for all types of federal crimes in 1957 ranged from 8.9 months in the District of New Hampshire to 54.6 months in the Western District of Oklahoma. The report noted various examples of sentence disparity between judicial districts, including two similar forgery cases in which one defendant received a three year sentence while the other received a twenty-four year sentence. The report concluded that adoption of the indeterminate sentencing scheme of § 4208(a)(2) would provide a method for minimizing such disparity:

> "Experience in State courts has suggested that the most practicable method for smoothing out such disparities lies in a sentencing system which permits the

courts to share with the executive branch the responsibility for determining how long a prisoner should serve before he can safely be released.

The provisions of the proposed legislation do not embody a softening in criminal penalties. Terms served under indeterminate sentences average longer than do terms under the fixed system." 2 *U.S. Code and Admin. News* 3891, 3893 (1958).

A fair reading of Congressman Celler's testimony indicates that he viewed good institutional progress as a relevant factor in determining whether parole would be granted. However, nothing in his testimony can be taken as a manifestation of intent to restrict the Parole Board's discretion in determining how much weight should be given to prison performance, by what means such performance should be evaluated, and when that evaluation should be undertaken. To the contrary, his testimony tends strongly to indicate that irrespective of prison performance the additional criteria set forth in 18 U.S.C. § 4203(a) would also be applicable:

> "In cases where [the sentencing judge] believes the defendant might respond quickly to the rehabilitation program the proposed bill would give the judge the authority to fix an earlier eligibility date for release. The prisoner would not be released, of course, unless the Board of Parole felt that he met the other requirements of the statute. It would, however, *obviate the need* of keeping a prisoner after he has received the full benefit of the program." Hearings on H.J. Res. 424, H.J. Res. 425, and H.R. 8923 before Subcommittee No. 3, House Committee on the Judiciary, 85th Cong., 2d Sess. (April 30, 1958) at 5. (Emphasis added).

Although Congressman Celler's testimony does not touch on the question of whether some additional parole con-

sideration must be given to an (a)(2) inmate who is denied parole prior to the expiration of one-third of his sentence, the issue was raised before the Subcommittee during an interchange between its Counsel and the Chief of the Division of Probation. This testimony occurred in the context of a discussion of the language and effect of the Judicial Conference's proposed amendment to H.J. Res. 425. The Judicial Conference proposed that H.J. Res. 425 be amended to include the language:

> "which time may be less than, but shall not be more than, the one third limitation now provided in section 4202 of this title, or the court may fix only the maximum sentence to be served, in which event the prisoner may be released at such time as the Board of Parole may determine." 2 *U.S. Code Cong. and Admin. News* 3897 (1958).

With insignificant exceptions 18 U.S.C. § 4208(a)(1) and (2) adopt this language.

During the Subcommittee hearing the following interchange occurred (at 75-76) with respect to this proposed amendment:

> "Mr. Willis: Counsel has one or two questions.
>
> Mr. Brickfield: I am directing my questions to this report that was submitted by the Judicial Conference of the United States . . . .
>
> My question is, Will the Board of Parole be required to act on this one-third limitation or will it release the prisoner in its own discretion when it feels that the prisoner is eligible or ready for release?
>
> Mr. Olney: Might I ask Mr. Sharp, the Chief of the Division of Probation to undertake to answer your question?
>
> * * *

Mr. Sharp: Mr. Chairman, I think I could put it best this way: It seems to me that this bill, as I understand it, provides three alternatives with respect to eligibility for parole. The first would be the one which is now in the existing law in section 4202 of Title 18 . . . .

* * * This amendment would provide two additional alternatives. One, the judge would specify the time for him to be eligible for parole. For example he could impose a six year sentence and specify a minimum of 1 year as the parole eligibility date. This is the first alternative . . . .

The second, as I see it, would be that he would impose, for example, a sentence of six years and specify no minimum eligibility date, and further specify that this particular commitment would not be handled under 4202.

In other words, that would give the judge a third alternative. If that is the case, the Board of Parole would then have the authority to release that person on parole at any time.

In other words, he is eligible from the first day of his commitment.

Mr. Brickfield: Or it could keep him until the sentence is completely served. Is that right?

Mr. Sharp: That is right.

Mr. Brickfield: It would not be bound by this one-third limitation in any respect?

Mr. Sharp: I would think not if the court specifies this third alternative at the time of sentencing.

I should like to say this, speaking administratively, I do not think that you would lose a man in an institution. I think administratively the Board of Parole would devise a tickler system or pattern of some sort to keep track, and I am sure, review those cases periodically."

Appellants submit that the foregoing tends strongly to suggest that 18 U.S.C. §4208(a)(2) does not prohibit the Board of Parole from contiuing an (a)(2) inmate beyond the one-third point of his sentence.

At the time of the District Court ruling in *Grasso I*, federal regulations provided for special review of an inmate's parole eligibility at any time "upon the receipt of *any* new information of substantial significance bearing upon the possibility of parole." 28 C.F.R. § 2.21 (Emphasis added). Evidence of rehabilitative progress clearly falls within this section. The existence of such a channel of communication by which significant information could be brought to the Parole Board's attention should have been held to satisfy the requirements of 18 U.S.C. § 4208(a)(2). While federal regulations in effect at the present time provide for parole reconsideration at the one-third point of an (a)(2) sentence, additional consideration at that juncture is not, and should not be held to be, required by 18 U.S.C. § 4208(a)(2).

II.

The District Court erred in holding that 18 U.S.C. § 4208(a)(2) requires that a full scale institutional parole hearing be given at the one-third point of an (a)(2) sentence.

The central issue before the Court in *Grasso II* was whether the additional parole consideration mandated by *Grasso I* at the one-third point of an (a)(2) sentence "must be a hearing at which the prisoner and his representative are present, or can be a review of the prisoner's file supplemented by a progress report." 376 F. Supp. at 117. The District Court determined this issue in petitioner Grasso's favor, holding that a full scale hearing is required and rejecting Appellants' claim that the progress report and file review procedure, now embodied in 28 C.F.R. § 2.14, 39

Fed. Reg. 20029 (June 5, 1974), fully complied with the requirements of 18 U.S.C. § 4208(a)(2). Appellants respectfully submit that the District Court erred in so determining, and that § 4208(a)(2) cannot, and should not be, interpreted as requiring an institutional hearing at the one-third point of (a)(2) sentences.

In support of its ruling that § 4208(a)(2) requires a full scale hearing at the one-third point of an (a)(2) sentence, the District Court reasoned, chiefly on the basis of *Grasso I*, that an (a)(2) inmate must also have the opportunity personally to appear at that point of his sentence to urge that parole is warranted. In line with this, the Court further expressed its view that the myriad of factors which constitute "good institutional progress" could be *"better considered"* as a result of a personal interview rather than from a file review." 376 F. Supp. at 119 (Emphasis added). Appellants submit that the District Court failed adequately to consider the purpose and effect of the parole decision-making guidelines employed by the Board of Parole at that time. Analysis of those guidelines compels the conclusion that an institutional hearing at the one-third point of such a sentence is not only unnecessary in the case of an (a)(2) prisoner, but may even hamper rehabilitation.

As an aid in determining what is an appropriate length of time for an inmate to serve before being released on parole, the Board of Parole utilizes a guideline table which provides for various combinations of offense severity and offender characteristics. The guideline table in effect at the time of the *Grasso* decisions (App. 1a) 28 C.F.R. § 2.52, 38 Fed. Reg. 31942 (November 19, 1973), is substantially identical to that in effect at the present time. *See* 28 C.F.R. § 2.20, 39 Fed. Reg. 20030 (June 5, 1974). Through the use of these guidelines, which clearly carry out the legislative purpose of the (a)(2) sentence as a disparity re-

ducing device, the Board of Parole is able to balance the parole prognosis of an offender against the severity level of the particular offense for which he is incarcerated, and thereby arrive at an appropriate period of confinement.

There are two chief advantages in being an (a)(2) inmate. The first is that an (a)(2) inmate is eligible for parole prior to the expiration of one-third of his sentence. The fact that approximately 17 to 18 per cent of all (a)(2) inmates are paroled prior to serving one-third of their sentences (Tr. 41-42)* indicates that this advantage is a real one. The second, and most important for present purposes, is that an (a)(2) inmate learns at a much earlier stage of his confinement when the guidelines call for his release. An (a)(2) inmate is located within the guideline table at his initial parole hearing, which occurs within 120 days of incarceration (Tr. 13, 27). A non-(a)(2) inmate, on the other hand, is not informed as to when the guidelines call for his release until his initial hearing, which occurs at the one-third point of his sentence (Tr. 41). By locating an (a)(2) inmate within the guidelines within 120 days of confinement, the Board of Parole is able to give such an inmate an early, reasonable estimate of the time which he can expect to serve. An (a)(2) inmate is thus spared the anxiety and uncertainty which is experienced by non-(a)(2) inmates, who until the one-third point of their sentences are kept in a state of uncertainty as to when the guidelines call for their release (Tr. 39-40).

Once an inmate is located within the guidelines, a subsequent hearing is scheduled for that point in time at which the guidelines indicate that parole is appropriate (Tr. 34). If an inmate performs satisfactorily to that date without any "intervening negative factors," he may reasonably expect to be paroled at that time. In excess of 90 per cent of all inmates are granted parole at subsequently scheduled review hearings, usually at the second hearing (Tr. 32-34).

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* All references are to the transcript of April 8, 1974 supplementary proceedings in *Diaz* v. *Norton* and *Grasso* v. *Norton*, *supra*.

It is essential for an inmate to be present before representatives of the Board of Parole when he is located within the guideline table, because it is at this hearing that his "salient factor score" is computed and the severity level of his offense determined (Tr. 22, 25). At this hearing an inmate is given the opportunity to explain his personal history, whether any previous criminal offenses recorded in his file truly were criminal in nature, and whether there are any mitigating factors which would affect or diminish the severity level of his offense (Tr. 22-25). The District Court also heard testimony that it is the feeling of the Board of Parole that there is therapeutic value in having an inmate personally appear at the hearing at which he is informed that parole has been granted (Tr. 86-87).

It is apparent, therefore, that an (a)(2) prisoner, who is not among the 5 per cent of (a)(2) prisoners immediately paroled on the basis of his initial hearing (Tr. 54), generally personally appears twice before the Board of Parole: initially, when he is located on the guideline table and, ultimately, at the hearing held when the guidelines call for release.

By ordering an additional hearing at the one-third point of an (a)(2) sentence, *Grasso II* requires Appellants to sandwich still another hearing between such an inmate's initial hearing and his last hearing. Such a requirement cannot be justified on the grounds that a hearing is necessary to enable an inmate to demonstrate satisfactory rehabilitation or good institutional progress, for the guidelines employed by the Board of Parole are based on a presumption of good institutional performance and rehabilitative progress (Tr. 90). *See also* 28 C.F.R. § 2.20(b); *Battle* v. *Norton*, 365 F. Supp. 925, 932 (D. Conn. 1973). Plainly such a requirement should not be imposed simply to enable an inmate to argue in person that he has achieved something which the Board of Parole already presumes he has achieved.

The progress report and file review procedure formulated in response to the District Court's ruling in *Grasso I*, see 28 C.F.R. § 2.14(b), provides for a complete and thorough review of an (a)(2) inmate's institutional record and specially-prepared progress report at the one-third point of his sentence. Appellants respectfully submit that such a formalized on the record review is wholly adequate to determine whether an inmate's institutional performance has been so exemplary as to warrant parole at a date earlier than that called for by the guidelines. As the Court in *Stroud* v. *Weger*, — F. Supp. — (M.D. Pa. 1974) (Sheridan, C.J.) stated:

> "This Court, which agrees that an (a)(2) prisoner cannot be given less effective parole consideration than a non-(a)(2) prisoner, nevertheless does not believe that at the one-third point the (a)(2) prisoner, who has already had an initial in-person parole hearing, is entitled to another in-person hearing. The new element absent from the (a)(2) prisoner's initial hearing that needs to be taken into account at the one-third point is his institutional performance and prison conduct, and this factor can be adequately reviewed by an examiner panel on the record by utilizing a current institutional progress report and by examining the inmate's prison files. An in-person hearing with respect to this factor would be of little benefit, and such a requirement would only increase the already heavy burden of the Parole Board." *Id.* at .....

Also see *United States* v. *Korner*, Crim. No. 73-984 (E.D. N.Y. August 26, 1974); *deVyver* v. *Warden*, Civil No. 74-621 (M.D. Pa. August 23, 1974); *Fillyaw* v. *Hogan*, Civil No. 74-377 (M.D. Pa. August 15, 1974); *Davis* v. *Henderson*, Civil No. 74-1012(a) (N.D. Ga. July 23, 1974); *Scott* v. *United States*, Civil No. 74-1013(a) (N.D. Ga. July 16, 1974); *Moody* v. *U. S. Board of Parole*, Civil No. 74-601(a) (N.D. Ga. April 1, 1974) (Tr. 36-40).

Appellants further submit that to sustain the District Court's requirement of full scale institutional hearings at the one-third point of (a)(2) sentences could have adverse effects upon the rehabilitation of (a)(2) inmates. As the testimony before the District Court indicates, the automatic scheduling of an in-person parole hearing at the one-third point of the sentence of an inmate who is not entitled to parole under the guidelines would run the very real likelihood of creating false hopes, tension, and frustration on the part of the inmate (Tr. 36, 40). This is hardly conducive to rehabilitation, and would contribute to restoring much of the anxiety and uncertainty which the Board of Parole seeks to eliminate. An on the record review, on the other hand, eliminates the tension which normally accompanies a full scale hearing (Tr. 37).

While it may well not violate § 4208(a)(2) to accord (a)(2) inmates a full scale hearing at the one-third point of their sentences, neither does it violate § 4208(a)(2) to accord (a)(2) inmates an on the record review at that juncture. The choice as to which of two legally acceptable practices should be followed should be left to the Board of Parole. It should not be determined by the Court's subjective view as to which procedure will enable the Board to "better consider" institutional progress. By prescribing the particular means by which the Board of Parole must consider one of many factors which enter into the parole decision-making process, see 18 U.S.C. §§ 4202, 4203(a), the District Court significantly infringed upon the wide discretion of the Board as recognized in *Scarpa* v. *U. S. Board of Parole*, 477 F.2d 278 (5th Cir. 1973).

Beyond this, the District Court ruling in *Grasso II* poses significant practical problems which could adversely affect the day-to-day operations of the Board of Parole. In 1972 alone 12,694 institutional parole hearings were conducted throughout the United States. In that same year, federal courts throughout the United States committed

2,847 persons to prison pursuant to 18 U.S.C. § 4208(a)(2) (Tr. 13). Statistics covering the four year period from 1968 to 1972 indicate a consistent significant increase in the number of § 4208(a)(2) commitments (Tr. 18).

At the time *Grasso II* was decided the entire United States Board of Parole consisted of 13 hearing examiners. Although Congress recently approved enlarging the staff of hearing examiners to 28, the Board of Parole does not at the present time have that number of examiners. Moreover, even when the authorized number of hearing examiners is reached, six of those 28 examiners will perform primarily administrative duties (Tr. 7-8).

Since 78 per cent of all (a)(2) inmates are continued beyond the one-third point of their sentences, the practical effect of *Grasso II* is to require the Board of Parole to conduct approximately 2,164 additional parole hearings each year (Tr. 17). In view of the fact that the statistics upon which this estimate is based do not cover the years 1972 through 1974, during which years the number of (a)(2) commitments may be assumed to have still further increased (Tr. 18), the number of additional hearings required by *Grasso II* may be even greater.

At the present time, each panel of hearing examiners must consider approximately 15 cases per day, simply to keep abreast of its caseload (Tr. 18). If 2,164 additional parole hearings were required each year, the authorized staff of hearing examiners throughout the United States would have to be increased by approximately 34 per cent just to keep current with its caseload (Tr. 19).

These problems are not presented by an on the record review procedure. Review of an institutional progress report can be accomplished in approximately 10 minutes. An institutional hearing, on the other hand, consumes approximately 25 to 35 minutes (Tr. 21). On the basis of such a

record review the Board of Parole is wholly capable of evaluating an inmate's institutional performance. If, on the basis of such an evaluation, it finds that institutional progress has been so outstanding as to warrant earlier parole, it may grant parole. If it finds that there is absolutely no basis for departing from its earlier decision, it may simply so inform the inmate. If it is not sure whether performance or conduct has been so commendable as to warrant earlier parole, it may schedule an in-person hearing at a future date for the purpose of acquiring further information (Tr. 28-29). Since an inmate has access to his progress report, he may also rebut any assertions therein with which he disagrees, emphasize any information which he deems relevant, and, generally, communicate with the Board of Parole by including his own memoranda within his file (Tr. 30-31, 36).

It is submitted that this procedure fully complies with 18 U.S.C. § 4208(a)(2).

CONCLUSION

For the foregoing reasons Appellants respectfully submit that the ruling of the District Court is unsound and should be overturned.

Respectfully submitted,

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GOVERNMENT'S APPENDIX

GUIDELINES FOR DECISION-MAKING (ADULT CASES)
AVERAGE TOTAL TIME SERVED BEFORE RELEASE
(INCLUDING JAIL TIME)

Offense Characteristics *	Offender Characteristics—Salient (Favorable) Factor Score (Probability of Favorable Parole Outcome)			
	(9–11) Very High	(6–8) High	(4–5) Fair	(0–3) Low
Category A—Low Severity Offenses Immigration law violations; Walkaway; Minor theft (includes larceny and simple possession of stolen property less than $1,000)	6–10 months	8–12 months	10–14 months	12–16 months
Category B—Low/Moderate Severity Offenses Alcohol law violations; Selective Service; Mann Act (no force—commercial purposes); Theft from mail; Forgery/Fraud (less than $1,000); Possession of marijuana (less than $500); Passing/Possession of counterfeit currency (less than $1,000)	8–12 months	12–16 months	16–20 months	20–25 months
Category C—Moderate Severity Offenses Simple theft of motor vehicle (not multiple theft or for resale); Theft, Forgery/Fraud ($1,000–$20,000); Possession of marijuana ($500 or over); Possession of Other "Soft Drugs" (less than $5,000); Sale of marijuana (less than $5,000); Sale of Other "Soft Drugs" (less than $500); Possession of "Heavy Narcotics" (by addict—less than $500); Receiving stolen property with intent to resell (less than $20,000); Embezzlement (less than $20,000); Passing/Possession of counterfeit currency ($1,000–$20,000); Interstate transportation of stolen/forged securities (less than $20,000)	12–16 months	16–20 months	20–24 months	24–30 months
Category D—High Severity Offenses Theft, Forgery/Fraud (over $20,000); Sale of marijuana ($5,000 or more); Sale of Other "Soft Drugs" ($500–$5,000); Sale of "Heavy Narcotics" to support own habit; Receiving stolen property ($20,000 or over); Passing/Possession of counterfeit currency (more than $20,000); Counterfeiter; Interstate transportation of stolen/forged securities ($20,000 or more); Possession of "Heavy Narcotics" (by addict—$500 or more); Sexual act (fear—no injury); Burglary (Bank or Post Office); Robbery (no weapon or injury); Organized vehicle theft	16–20 months	20–26 months	26–32 months	32–38 months
Category E—Very High Severity Offenses Extortion; Assault (serious injury); Mann Act (force); Armed robbery; Sexual act (force—injury); Sale of "Soft Drugs" (other than marijuana—more than $5,000); Possession of "Heavy Narcotics" (non-addict); Sale of "Heavy Narcotics" for profit	26–36 months	36–45 months	45–55 months	55–65 months
Category F—Greatest Severity Offenses Aggravated armed robbery (or other felony)—weapon fired or serious injury during offense; Kidnapping; Willful homicide	(Information not available due to limited number of cases)			

* Notes: (1) If an offense behavior can be classified under more than one category, the most serious applicable category is to be used. If an offense behavior involved multiple separate offenses, the severity level may be increased. (2) If an offense is not listed above, the proper category may be obtained by comparing the severity of the offense with those of similar offenses listed. (3) If a continuance is to be recommended, allow 30 days (1 month) for release program provision.

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 74-1222

FRANK GRASSO
Appellee-Petitioner

v.

JOHN J. NORTON, WARDEN, FEDERAL CORRECTIONAL INSTITUTION, DANBURY, CONNECTICUT, et al
Appellants-Respondents

AFFIDAVIT OF SERVICE BY MAIL

Albert Sensale, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 914 Brooklyn Ave Brooklyn, N.Y.

That on the 24th day of September, 1974, deponent served the within Brief and Appendix for the Appellants-Respondent upon ~~[illegible]~~

Dennis E. Curtis, Esq., 127 Wall Street, New Haven, Connecticut 06502

Attorney(s) for the Appellee in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Albert Sensale

Sworn to before me,

This 24th day of September 1974

William A. McKaigney

WILLIAM A. McKAIGNEY
Notary Public, State of New York
No. 41-7846700
Qualified in Queens County
Certificate filed in Kings County
Commission Expires March 30, 1976